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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 07 2005

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a research assistant and doctoral student at the New Jersey Institute of Technology (NJIT). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The

> burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel discusses the petitioner's work in the field of chemical engineering, stating that the petitioner "established himself as an emergent leader early in his career," "conducted groundbreaking research," and is "[r]ecognized as a leading researcher in bioseparation and chromatography." Regarding the petitioner's most recent work, counsel states:

> [The petitioner] has been instrumental in the significant development of a novel integrated membrane filtration and chromatography process for fast and economical bioproduct recovery and purification. The novel device configuration increased the protein loading capacity and separation significantly. He conducted the simulation of loading and elution behaviors of the unit, and optimized the design and operating parameters to further improve the protein separation performance. He observed a protein enhancement phenomenon through the membrane in the novel integrated process and provided a theoretical analysis to explain the mechanism. . . .
>
> [The petitioner's] current research has been focused on the direct capture and purification of the bioproducts from unclarified feed such as fermentation broth or cell culture harvest utilizing his novel integrated membrane filtration and chromatography process.

Along with copies of published articles, conference abstracts, and patent documents, the petitioner submits six witness letters. Professor [redacted] who serves on the petitioner's doctoral advisory committee at NJIT, states that the petitioner is "a valuable intellectual resource" who works in an important field, but Prof. [redacted] offers no specific comments about the petitioner's work or its impact on the field. Professo[redacted] who has supervised the petitioner's doctoral studies at NJIT, describes the petitioner's work:

> Advances in biotechnology have made it possible to use cells as green factories for chemicals, antibodies, enzymes and other therapeutic proteins. But the era of large-scale production using biotechnology will not come soon until we get some breakthrough in the area of effective and economical bioseparation technology. . . . The breakthrough research work of [the petitioner] is just ideal to break this logjam. The integrated membrane filtration-cum-chromatography that he has developed . . . offers direct recovery and purification of the

> target products from unclarified cell suspensions, resulting in reduction of the processing time and costs for large-scale production of the needed specialty chemicals and therapeutic proteins. . . .
>
> [The petitioner] has made significant and original contributions to membrane and bioseparation technology. He invented a partial coating device and technique to modify hollow fiber and other membrane modules, which increased the protein separation capacity of the integrated unit by five to seven times. . . . His ingenious and conceptually novel ideas have made him a leading member of our research team and enabled him to contribute new technologies to the chemical and pharmaceutical industries.

The burden is on the petitioner to show that the chemical and pharmaceutical industries have, in fact, availed themselves of the petitioner's contributions. [redacted] fellow and program manager for Process R&D at CPKelco Inc., "a company producing biopolymers using biotechnology," states:

> Recovery and purification of bioproducts is a critical and expensive part of the nowadays production process, often accounting for over three-fourths of total production costs. . . . With more and more health care products as well as other chemicals . . . being produced using biotechnology, the food and pharmaceutical industries are waiting for the breakthrough bioseparation technology to increase the output and reduce the large-scale production costs so that people can get the health care products sooner and much cheaper.
>
> I knew [the petitioner] by his presentation in an AIChE [American Institute of Chemical Engineers] Annual Meeting. . . . His work on separation and purification of proteins directly from fermentation broth drew great attentions from both academic and industrial scientists. Integrating the membrane filtration and chromatographic separation in one unique device, [the petitioner] developed a very effective and low-cost novel bioseparation process to recover and purify the proteins from the fermentation broth.

[redacted] a research fellow at Merck Research Laboratories, states that the petitioner's new technology "is expected to" "recover, concentrate and purify the biologics in a single step." He offers no indication that [redacted] itself a major pharmaceutical manufacturer, has adopted the petitioner's technology or has taken concrete steps toward doing so. [redacted] a research engineer at MEDAL/Air Liquide (a DuPont subsidiary), states that, in addition to the technology described above, the petitioner "has also made original and important contributions in other technical areas pertaining to the separation and recovery of key solutes from broths and mixtures. More recently, he completed an advanced theoretical study of the transmembrane mass transfer enhancement phenomenon due to the permeate-side adsorption."

[redacted] of the Ohio State University, a member of the National Academy of Engineering and a former chair of AIChE's Separations Division, asserts that the petitioner's work "has the potential for a major reduction in separation and purification time and costs for biobased manufactured chemicals and healthcare products." He states that the petitioner "has been very active at North American Membrane Society and AIChE meetings, the most influential conferences on membrane and chemical engineering technologies. His presentations in these meetings and his remarkable research work are highly regarded in the scientific community."

The director denied the petition, noting the witnesses' claims but asserting that "[t]he record contains insufficient contemporaneous documentary evidence of the [petitioner's] claimed preeminence in the field,"

such as "extensive lists of scientific citations for his published works or other evidence that the [petitioner's] methodologies have been widely adopted by others in the field."

On appeal, the petitioner submits materials showing a total of ten citations of three articles; one article was cited eight times, and the other two were cited once each. Some of these citations are self-citations by the petitioner and/or his collaborators, rather than independent citations demonstrative of wider recognition. This citation rate does not corroborate the assertion that the petitioner's work has generated high interest throughout the field.

Similarly, a December 15, 2004 letter from [redacted] NJIT's assistant vice president for Technology Development, indicating that NJIT is "currently working to commercialize the patented technology," an indication that the technology was not actually in use as of December 2004, over a year after the petition's September 2003 filing date. The record contains a copy of a United States patent *application*, filed May 12, 2003, but there is no indication that a patent has been issued for the petitioner's invention. This is consistent with witness statements that discuss the "potential" of the petitioner's work rather than its existing, demonstrable impact on the field. The petitioner argues that [redacted] letter "demonstrates that the petitioner's patented technology will be marketed and commercialized," but actually it demonstrates only that NJIT *intends to attempt* marketing and commercialization. Also, the petitioner's reference to "patented technology" seems to imply, incorrectly, that the patent application has already been approved.

The record does show the petitioner's name on two Chinese patents issued in 1998, but the record is silent as to the implementation of these patented devices. While the petitioner is the credited inventor of two Chinese patents, there is no indication that the petitioner's work in the United States has yielded any approved patents.

The petitioner argues on appeal that the waiver should not "be limited only to aliens whose work has enjoyed 'widespread implementation.'" This is a reasonable assertion on its face, but we must consider the facts and circumstances of each particular case. In this instance, the petitioner's claim of eligibility rests heavily on one research project that the petitioner undertook at NJIT, and his work on that project is said to serve the national interest because of the tremendous savings it would generate in the manufacture of pharmaceutical products. Given that this commercial application is fundamental to the claim, the lack of evidence of commercial interest is significant. The petitioner's device will not significantly serve the national interest unless it is, in fact, widely implemented. No inherent benefit arises simply from the existence of the concept or the filing of a patent application.

Evidence and statements submitted on appeal show that the petitioner completed his doctorate in January 2004, and now works at JFC Technologies. The record contains no details about the petitioner's current work, and therefore the petitioner has not shown that his current work is as beneficial as the earlier, now-completed projects that formed the nucleus of his waiver request. We further note that the petitioner's H-1B1 nonimmigrant status allows him to work for JFC Technologies through September 2007, during which time JFC Technologies is permitted to pursue an application for labor certification should it choose to do so. The denial of the present petition in no way affects the beneficiary's ability to work in valid nonimmigrant status.

While some of the witnesses' evaluations of the petitioner's work are certainly enthusiastic and optimistic, the record as a whole suggests that the waiver request is, at best, premature. There is no persuasive evidence to show that the petitioner has already had an influence on the manufacture of pharmaceutical products significant enough to justify the inference that nationally significant benefits are probable.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.